

Goodwill Industries of Denver and United Food and Commercial Workers International Union, Local No. 7, AFL-CIO, CLC Petitioner. Case 27-RC-7036

August 27, 1991

**DECISION ON REVIEW AND DIRECTION
OF ELECTION**

BY CHAIRMAN STEPHENS AND MEMBERS
CRACRAFT AND OVIATT

On December 21, 1989, the Regional Director for Region 27 issued a Decision and Order in the above-entitled proceeding in which he declined to assert jurisdiction over the Employer in reliance on *Goodwill Industries of Southern California*, 231 NLRB 536 (1977). Thereafter, in accordance with Section 102.67 of the National Labor Relations Board Rules and Regulations, the Petitioner filed a timely request for review of the Regional Director's decision contending, inter alia, that the Regional Director erred in relying on *Goodwill Industries of Southern California* and erred in finding that all of the Employer's employees are handicapped. By order dated August 28, 1990, the Board granted the Petitioner's request for review.¹

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record in this case and makes the following findings.

The Employer, Goodwill Industries of Denver (Employer or Goodwill), is a nonprofit, charitable corporation with a principal office and place of business in Denver, Colorado. Its stated purpose is to provide employment, training, and job placement services to handicapped individuals. The Employer employs approximately 350 individuals, which includes 40 staff, supervisory, or professional employees, 70 client/trainees, and 240 client/employees.

The Employer's primary operation is its contributed-goods program by which it collects, processes, and sells goods that are donated by the public. Seventy-five percent of the Employer's operating income is derived from the contributed-goods program. At issue in this case, however, is the Employer's operation at Lowry Air Force Base. Under a contract obtained pursuant to the Wagner-O'Day Act,² the Employer provides janitorial, meat room cleaning, and merchandise stocking services at the Lowry Air Force Base commissary (Lowry). The record indicates that in the approximately 4 years the Employer has held the contract, it has lost approximately \$100,000, while providing over \$1 million in wages to handicapped individuals.

The Employer employs at Lowry 3 supervisors, 1 trainer, 2 meat room employees, 30 merchandise stockers, and approximately 5 janitorial employees. The Regional Director found that all these individuals, aside from the supervisors and trainer,³ are handicapped and classified as either client/trainees or client/employees. Individuals in the former group tend to be more severely handicapped than those in the latter. The Union petitioned for an election among all stockers, clients, janitors, and meat cleanup personnel employed by Goodwill at Lowry.

The Regional Director found that the client/employees and client/trainees at Lowry are allowed to work at their own pace and are paid on a piece rate basis or at a standard rate which is certified by the Department of Labor. These individuals work according to a set schedule, but fewer than 40 hours per week. Although the client/trainees and client/employees are subject to discipline in extreme cases, the Employer's practice is to counsel them for any difficulties that arise and, if practicable, to transfer them to another employment position at one of Goodwill's other locations. If an individual is placed in outside employment, Goodwill will hold open that individual's position at Lowry for 30 days in the event that the outside employment proves unsuitable. According to the Regional Director, some individuals are relatively long-term employees, while others are employed for very brief periods.

The Regional Director found the circumstances of this case to be indistinguishable from those in *Goodwill Industries of Southern California*, supra, in which the Board, while asserting jurisdiction over that employer under its jurisdictional retail standard, nevertheless declined to assert jurisdiction over a sought-after unit of clients of that employer in light of the primarily rehabilitative purpose of their employment.⁴ Thus, although the Board found that the clients in that case might arguably be statutory employees, it concluded that to permit collective bargaining would risk a harmful intrusion on the rehabilitative process.⁵ Similarly, the Regional Director noted that while the clients in this case might arguably be statutory employees, he concluded that it would not effectuate the purposes of the Act to assert jurisdiction. Accordingly, the Regional Director dismissed the petition.

³ The parties stipulated that Supervisors Barbara Harms and Dan Sandoval, as well as trainer Tracy Wise, should be excluded from the unit as statutory supervisors. The Regional Director found it unnecessary to resolve the status of Supervisor Cathy Corwin, which the parties disputed, in light of his decision to decline jurisdiction over the Employer.

⁴ We emphasize that the petitioned-for unit consisted solely of clients in *Goodwill Industries of Southern California*, and that the Board's declination of jurisdiction was over the clients as a class and not over the employer itself.

⁵ The Board noted that the employer in *Goodwill Industries of Southern California* furnished its clients, in addition to employment, with rehabilitation, social service, vocational, medical, and legal counseling. Additionally, the clients' progress and performance were reviewed at least once a year.

¹ Member Oviatt dissented from the Board's grant of the request for review.

² 41 U.S.C. §§ 46-48. Under that law, Government contracts are allocated to various nonprofit organizations through noncompetitive bidding.
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The Union argues in its request for review that, contrary to the finding of the Regional Director, there are nonhandicapped individuals employed by Goodwill at Lowry.⁶ The Union further argues that only the client/trainees can be described as undergoing rehabilitation, rather than the client/employees, many of whom are permanent employees. The Union contends, moreover, that the Regional Director erred in his "blanket reliance" on *Goodwill Industries of Southern California* and further argues that many of the services provided by the employer in that case are not provided in this case. For the following reasons, we agree with the Union that the Regional Director erred in relying on *Goodwill Industries of Southern California*.

It is well-established that the Board is not precluded from asserting its jurisdiction merely because an employer is a nonprofit, charitable organization engaged in a worthy purpose. *St. Aloysius Home*, 224 NLRB 1344, 1345 (1976); *Hudelson Baptist Childrens Home*, 276 NLRB 126 (1985). The Board will decline jurisdiction over such an employer if its activities do not have a sufficient impact on interstate commerce to warrant the exercise of jurisdiction, however. *St. Aloysius Home*, supra at 1345. The Board will further consider whether those employed by the nonprofit charitable organization are employees within the meaning of Section 2(3) of the Act. *Lighthouse for the Blind of Houston*, 244 NLRB 1144 (1979), enf. 696 F.2d 399 (5th Cir. 1983); *Cincinnati Assn. for the Blind*, 235 NLRB 1448 (1978), enf. 672 F.2d 567 (6th Cir. 1982), cert. denied 459 U.S. 835 (1982).

Based on these principles, we find that the Regional Director erred in dismissing the petition solely because of the Employer's worthy rehabilitative purpose.⁷

Further, the Employer clearly satisfies our jurisdictional standards for retail enterprises. During calendar year 1989, the Employer's revenue from retail operations was approximately \$3-1/2 million. Additionally, in that same time period, the Employer purchased goods valued in excess of \$50,000 from sources located directly outside the State of Colorado. We therefore find that it will effectuate the policies of the Act to assert jurisdiction over the Employer.

The remaining inquiry is whether the individuals employed by Goodwill at Lowry are employees within the meaning of Section 2(3) of the Act. In making this determination, the Board examines the relationship be-

tween the nonprofit employer and its workers. When the relationship is guided to a great extent by business considerations and may be characterized as a typically industrial relationship, statutory employee status has been found. When the relationship is primarily rehabilitative and working conditions are not typical of private sector working conditions, however, the Board has indicated it will not find statutory employee status. *Arkansas Lighthouse for the Blind*, 284 NLRB 1214, 1216-1218 (1987), enf. denied 851 F.2d 180 (8th Cir. 1988); *Cincinnati Assn. for the Blind*, supra at 1448-1449.

We find, initially, that the Employer's client/trainees are not statutory employees. As found by the Regional Director, the client trainees are allowed to work at their own pace and are not subject to production quotas or discipline for insufficient production. Further, discipline is imposed only in extreme cases. Goodwill's practice is to counsel the client trainees if difficulties arise with their employment at Lowry, and to transfer them to a position at another Goodwill location if Lowry is deemed unsuitable. Further, President and Chief Executive Officer Welker testified that client/trainees will be discharged only for failure to come to work or for eating commissary food, which violates Air Force regulations; those regulations are strictly enforced by the Air Force.

Moreover, the client/trainees, virtually all of whom are referred to Goodwill by various government and nongovernmental agencies, participate in Goodwill's rehabilitation program. This includes an initial evaluation of the client/trainee and continuing evaluation thereafter in conjunction with the referring agency. Training includes instruction of the client/trainees to remain at their assigned work area, to interact appropriately with staff, and to follow instructions. Many of the client/trainees are transported to and from Lowry by trainer Tracy Wise, who is present during the working hours of the client/trainees. Additionally, Goodwill employs two full-time job-placement specialists who are responsible for placing the client/trainees in competitive outside employment.⁸

We accordingly find the focus of Goodwill's relationship with its client/trainees to be clearly rehabilitative. Further, Goodwill's lack of emphasis on production by the client/trainees, and its reliance on counseling, with use of discipline and discharge only in extreme cases, indicate that the working conditions of the client/trainees are not primarily guided by economic or business considerations and are not typical of those in the private sector.⁹

⁶Our review of the record, including the testimony of Goodwill's president and chief executive officer, Thomas Welker, indicates that approximately one-third of those employed by Goodwill at Lowry are not handicapped and constitute, in effect, a third group of employees in addition to the client/trainees and client/employees.

⁷To the extent that *Goodwill Industries of Southern California* may be read as indication otherwise, it is overruled. See *Lighthouse for the Blind of Houston*, supra at 1145 fn. 9. Further, to the extent that *Goodwill Industries of Southern California* has ever been construed as holding that the Board will dismiss a petition as to an employer operating a primarily rehabilitative training program even if the employer employs individuals who are not clients in that program, we disavow that holding.

⁸A client/trainee remains at Lowry for an average of 6 weeks.

⁹Compare *Arkansas Lighthouse for the Blind*, supra, in which the Board found workshop clients to be statutory employees in light of, inter alia, the maintenance of production standards and penalties for poor performance, the

In contrast, the record indicates that only an unspecified number of the Employer's client/employees receive the services detailed above, and many apparently work with little or no counseling at all. Further, approximately one-half of the client/employees are relatively long-term employees of the Employer. Nevertheless, Goodwill's disciplinary policy toward its client/employees is no different from that vis-a-vis its client/trainees: a focus on counseling regarding work difficulties, discipline or termination only in extreme circumstances, and an effort to transfer an individual to a position at another Goodwill location if serious difficulties arise at Lowry. Additionally, client/employees, like client/trainees, are permitted to work at their own pace. Thus, despite Goodwill's diminished provision of rehabilitative services to client/employees, its disciplinary and production policy is clearly not typically industrial, and is guided not by business considerations but rather by a desire to continue to provide employment opportunities for its client/employees. Accordingly, we cannot conclude that the client/employees are employees within the meaning of the Act.

Finally, the record indicates that Goodwill's remaining nonhandicapped employees neither receive rehabilitative services nor are subject to the flexible dis-

absence of any counseling services, and the lack of a job-placement counselor or program.

ciplinary and production policies described above. Indeed, Welker testified that these employees, unlike the client/trainees and client/employees, are subject to discharge for failure to meet Goodwill's production standards. Therefore, the working conditions of these individuals are typical of private sector working conditions and, in the absence of the provision of any rehabilitative services whatsoever, we find these individuals to be employees within the meaning of Section 2(3) of the Act.

Accordingly, we shall direct an election in the following appropriate unit composed of those individuals we have found to be employees under the Act:

All stockers, janitors, and meat clean-up personnel, including part-time workers who work regularly one day or more a week, employed by the Employer at its Lowry Air Force base location; but excluding client/trainees, client/employees, the store managers, 1st assistant manager, office and clerical workers, and supervisors as defined in the National Labor Relations Act.¹⁰

[Direction of Election omitted from publication.]

¹⁰As the unit found appropriate is not that petitioned for by the Union, the Union may notify the Regional Director if it does not wish to proceed to an election in this basis. In the event of an election, we direct that Cathy Corwin, whose status as a supervisor was disputed by the parties, shall vote subject to challenge.